MALAYAN BANKING BHD.

v.

CHAN SIT CHEE & ANOR AND BEH WENG SUI @ BEH WENG SOOI (INTERVENER)

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK JC
[ORIGINATING SUMMONS NO. 24-45-93 (90)]
14 SEPTEMBER 1993

PRACTICE & PROCEDURE: Intervener - Plaintiff obtained Court order for sale of land by public auction of defendant's property - Property was subject of charge in favour of plaintiff - Intervener applied and obtained Court order to postpone auction sale and to enable intervener to purchase said property - Court order gave leave to intervener to purchase property by way of private treaty with plaintiff - Intervener to pay deposit of 10% of reserved price and balance within 3 months from date of Court order - Plaintiff received 10% deposit from intervener - Private treaty was never entered into between plaintiff and intervener - Balance of purchase price not paid by intervener within the three months - Intervener's application for extension of time to pay balance purchase price dismissed by Court - Intervener applied for refund of the 10% deposit - Whether Intervener entitled to refund of the 10% deposit.

The question for determination in this case was whether the plaintiff was entitled to forfeit the 10% deposit paid by the intervener pursuant to an order of Court as since the intervener has not paid the balance of the purchase price on the due date.

Held:

[1] As there is no private treaty nor a binding contract between the plaintiff and the intervener, the intervener is entitled to a refund of his 10% deposit.

[2] The Court order of 4 September 1992, is silent as to the disposal of the 10% deposit after the expiry of the three months' period and this was tied up with the requirement that a private treaty should be entered between the parties.

[3] In the absence of a private treaty or binding contract, the intention of the parties is not relevant nor can it be ascertained.

[4] The order of this Court dated 17 May 1993, given in Chambers was affirmed. The intervener was entitled to the refund of his 10% deposit and he was also entitled to costs.

[Deposit of 10% ordered to be refunded to intervener with costs].

Cases referred to:

Wee Choo Keong v. MBf Holdings Bhd. & Anor. & Anor. Appeal [1993] 3 CLJ 210 SC ***(refd)***
Chillingworth v. Esche [1924] 1 Ch 97, 104 ***(refd)***
Von Hatzfeldt - Wildenburg v. Alexander [1912] 1 Ch D 284 ***(foll)***
Coope v. Ridout [1921] 1 Ch D 291 ***(foll)***
Howe v. Smith [1884] 27 Ch D 89 ***(refd)***
Warren v. Tay Say Geok & Ors. [1965] 1 MLJ 44 ***(refd)***
Linggi Plantations v. Jagatheesan [1972] 1 MLJ 89 ***(refd)***
Soper (Pauper) v. Arnold & Anor. [1889] 14 App. Cas 429 [1889] HL (E) Vol. 429 ***(refd)***
Siah Kwee Mow v. Kulim Rubber Plantations [1979] 2 MLJ 190 ***(cit)***
Lee Yew Hin v. Kow Lup Piow [1974] 1 MLJ 114 ***(cit)***
Song Toh Chu v. Chan Kiat Neo [1973] 2 MLJ 206 ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 56 r. 2(2)

For the plaintiff - Lim Meng Huat; M/s. Izhar Haji Saidin & Co.
For the intervener - G.S. Ramanaidu; M/s. R. Naidu & Co.

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak JC:

On 31 March 1992, the plaintiff obtained a Court order for sale by public auction against the defendants, pursuant to a charge, vide presentation No: 20493/86, Vol. 2171, folio 26, over a piece of land comprised under H.S (D) L & M 2507/80, Lot P.T. No: 3038, Mukim of Kamunting, district of Larut and Matang, State of Perak (hereinafter referred to as "the said property") (see enclosure no: 13).

On 29 June 1992, the plaintiff pursuant to the summons for directions dated 23 May 1992 (enclosure No: 14) obtained a Court order (enclosure No: 15), *inter alia*, to auction the said property on 14 September 1992.

By a summons in chambers dated 6 August 1992 (enclosure No: 17) supported by the affidavit of the intervener sworn on 31 July 1992 (enclosure No: 16), the intervener applied and obtained a Court order dated 4 September 1992 (hereinafter referred to as "the Court order of 4 September 1992") (see enclosure No: 22), *inter alia*, postponing the auction sale of the said property and enabling the intervener to

purchase the said property. The relevant portions of the Court order of 4 September 1992 are reproduced below:

> DAN ADALAH DIPERINTAHKAN bahawa jualan Lelong yang ditetapkan pada 14 September 1992 diberhentikan atau ditangguhkan sehingga notis selanjutnya.
>
> DAN ADALAH DIPERINTAHKAN bahawa pencelah Beh Weng Sui @ Beh Weng Sooi itu kini dan dengan ini diberikan kebenaran untuk membeli harta yang dipegang di bawah H.S.(D) L & M 2507/80 untuk No: Lot PT 3038 dalam Mukim Kamunting dalam Daerah Larut dan Matang dalam Negeri Perak **dengan triti persendirian** untuk jumlah wang sebanyak ringgit Satu Ratus Dua Puluh Tujuh Ribu Empat Ratus dan Empat Puluh Tiga dan sen Lima Puluh Tujuh (RM127,443.57) sahaja.
>
> DAN AKHIRNYA ADALAH DIPERINTAHKAN bahawa pencelah Beh Weng Sui @ Beh Weng Sooi **mendepositkan 10% harga rezab pada tarikh perintah ini diberi dan bakinya dibayar dalam masa tiga (3) bulan dari tarikh perintah ini.**

Put shortly, the Court order of 4 September 1992 gave the intervener an opportunity to purchase the said property at RM127,443.57 sen by way of a private treaty; and the intervener was required to deposit 10% of the reserved price on the date of the Court order and the balance payable within three months from the date of the Court order.

On or about 10 September 1992, the plaintiff through its solicitors Messrs. Izhar Haji Saidin & Co, received RM12,743 being the 10% deposit from the intervener's solicitors Messrs. RCM Rayan.

The private treaty as envisaged in the Court order of 4 September 1992, was never entered into between the plaintiff and the intervener. In due course, the intervener failed to pay the balance of the reserved price within three months from the date of the Court order (that is, the Court order of 4 September 1992).

By a summons in chambers dated 4 December 1992 (enclosure No: 24) supported by the intervener's affidavit dated 1 December 1992 (enclosure no: 23), the intervener applied for an extension of time to pay the balance of the reserved price. The application of the intervener was heard and dismissed on 28 December 1992 with costs.

The plaintiff through its solicitors wrote a letter dated 14 December 1992, to the High Court, Ipoh, Perak (enclosure no: 25) requesting for a new date wherein a public auction of the said property could be effected.

In the meantime, by a summons in chambers dated 2 February 1993 (enclosure no: 31), the intervener applied for:

(a) the refund of the 10% deposit
(b) the Court order of 4 September 1992, be vacated or set aside.

This application was supported by an affidavit of the intervener dated 22 January 1993 (enclosure no:30). The plaintiff through its manager filed an affidavit-in-reply dated 12 May 1993 (enclosure no: 33) praying for:

(a) dismissal of the intervener's application with costs
(b) the Court order of 4 September 1992, be vacated or set aside, and
(c) the plaintiff be allowed to auction the said property by public auction.

On 17 May 1993, this Court heard, in chambers, enclosure numbers 30, 31 and 33 and allowed the refund of 10% deposit to the intervener with costs. The plaintiff through its solicitors by letter dated 20 May 1993 (enclosure no: 34) applied to the Senior Assistant Registrar for the adjournment of the matter into Court for further argument under rule r. 2(2), O. 56 of the Rules of the High Court 1980. Thus, on 27 May 1993, the matter was argued further in open Court.

The question for determination is whether the plaintiff is entitled to forfeit the 10% deposit since the intervener has not paid the balance of the purchase price on the due date.

In the absence of a private treaty, this Court must look at the terms of the Court order of 4 September 1992.

Without a doubt, the Court order of 4 September 1992, must be obeyed. There are quite a number of decisions in regard to the question of obedience to Court orders. Recently the Supreme Court had occasion to consider this point in the case of *Wee Choo Keong v. MBf Holdings Bhd. & Anor And Anor. Appeal* [1993] 3 CLJ 210 SC, where the Lord President Tun Abdul Hamid bin Omar said:

> It is established law that a person against whom an order of Court has been issued is

duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

In my judgment, both the plaintiff and the interveners are bound by the Court order of 4 September 1992. In regard to the 10% deposit, the Court order of 4 September 1992 contained precious little. All it said was this:

... mendepositkan 10% harga rezab pada tarikh perintah ini diberi dan bakinya dibayar dalam masa tiga (3) bulan dari tarikh perintah ini.

The Court order of 4 September 1992, is not a contract and it can never amount to a contract. This is clearly borne out by the requirement that a private treaty must be drawn up between the parties in the Court order itself. Therefore, it is not incorrect to say that the Court order of 4 September 1992, was conditional upon the subsequent execution of a private treaty. Put in another way, the agreement of the intervener to purchase the said property was, therefore, inchoate, of the type where a purchaser of the said property agrees to purchase subject to a private treaty be drawn up. The position is akin to that in *Chillingworth v. Esche* [1924] 1 Ch 97, 104 where Pollock MR said:

I think when you look at the words here used that what was intended was that the whole document should be conditional on the execution of a proper contract, to be prepared by the vendor's solicitors ... and I think that the intention of the parties was that the full conditions should be considered in a further contract, and that until that further contract was executed there should be no binding contract for the purchase of the property ... this Court having come to the conclusion that the nature of that agreement was inchoate, it follows that if, at a time before execution of the further agreement, negotiations were broken off, the deposit ought to be repaid to the purchasers.

In *Von Hatzfeldt - Wildenburg v. Alexander* [1912] 1 Ch. D. 284, where an alleged contract for the sale of a leasehold house, contained in letters wherein it was stipulated by the purchaser that her acceptance was subject to, amongst others, a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract". It was held that on the construction of the documents, not to be a complete contract susceptible of being enforced by way of specific performance. In the words of Parker J:

The argument on the true construction of the letters themselves depends on the reference contained in the offer of 25 April to the form of contract being approved by the purchaser's solicitors. This no doubt shews that the approval of the purchaser's solicitors of a more formal document containing the terms of the agreement between the parties for the sale and purchase of the premises in question was in the contemplation of Messrs.. Walton & Lee, and if a formal document was to be approved, it was no doubt also contemplated that it would be executed. I think I must take it that Messrs. Curtis & Henson in accepting the terms offered by the letter of 25 April accepted them on the same footing.

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will infact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire ...What then is the true construction of the letters said to constitute the contract? The letter of 25 April, unlike the letter of 18 April, is in form a conditional and not a firm offer. It is expressed to be subject to four conditions ... It is the second condition which contains the reference to the formal contract. It provides that the plaintiff's solicitors approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract. There is some authority for saying that where a purchaser stipulates that his solicitor shall approve the title of the property such stipulation may possibly be construed as a recognition that the title will be examined in the usual way and need not be construed as a

condition at all. But such a construction is impossible in this case, for the plaintiff's solicitors have to approve also the freehold title, which cannot be called for on an open contract for the sale of a lease. The second condition must therefore, at any rate as to this, be treated as a real condition. It does not in terms compel the vendor to shew the freehold title, but unless he does so to the satisfaction of the purchaser's solicitors he cannot hold the purchaser to her bargain. I do not think it would be in accordance with principle or sound sense to treat the second condition as in part a real condition and in part only the expression of a mere desire on the part of the purchaser. Further, having regard to the fact that the vendor's acceptance is the acceptance of an offer conditional on the execution of a more formal contract, I do not think the condition is one which the purchaser can waive as solely in her own favour. The vendor may well have allowed the condition as to the freehold title to pass in reliance on the fact that his own advisers would insert in the more formal agreement proper provisions in his favour.

My conclusion is that this case is within the principle of *Winn v. Bull* (17 Ch.D. 29) and numerous other similar cases, and that the letters do not constitute a binding contract. I need not therefore consider the argument based on *Hussey v. Horne-Payne* (4 App. Cas. 311).

Next, in *Coope v. Ridout* [1921] 1 Ch. D. 291, where purchasers made an offer by letter to the vendor to purchase his freehold property at a specified sum "subject to title and contract." Negotiations followed, and the purchasers alleged that all the material terms were subsequently agreed to between the parties at an interview and by letters, and were embodied by the purchasers in a draft contract which the vendor returned unaltered with the words: "It seems to be all in order." The vendor having refused to complete, the purchasers brought an action for specific performance of the contract contained in the draft. On these facts it was held that even assuming that all the terms of the agreement had been settled one by one and embodied in the draft, the condition contained in the offer required that a written agreement made *inter partes* should be formally entered into, and in the absence of such a document there was no enforceable contract. Lord Sterndale MR in a short judgment, had this to say:

I think the condition contemplates and requires a written contract *inter partes* and formally entered into. In my opinion, that document has never come into existence in this case, and, in the absence of it, I cannot think I ought to hold that the defendant is bound. In my opinion, the condition requires that a written contract should be formally entered into between the parties. No such contract was ever entered into in the present case.

Applying the above principles to the present case, I am constrained to say that the Court order of 4 September 1992, requires a formal private treaty to be entered into between the parties and in the absence of such private treaty, there was no contract ever entered into between the parties and consequently, the 10% deposit is refundable.

But that is not the end of the matter. The word "deposit" appearing in the Court order dated 4 September 1992 entails some difficulty.

In *Howe v. Smith* [1884] 27 Ch. D. 89, a sum of money was paid as deposit and part payment of the purchase money. The contract was to be completed by a certain date and it was not so completed and the vendors sold to someone else. The purchaser sued for specific performance, which was refused, as he himself had been in default, and then, being allowed to amend his pleadings, he sued for return of deposit. It was held that the deposit being in the nature of a guarantee that the contract should be performed was forfeited and could not be returned. Bowen LJ said:

The question as to the right of purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract.

In regard to the meaning of the word "deposit", Cotton LJ, in a separate judgment, in *Howe v. Smith* (supra) had this to say:

What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase - money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit.

It is pertinent to point out that in at least two decisions of the Privy Council on appeal from Malaysia, their Lordships of the Privy Council accepted Cotton LJ's definition of the word 'deposit'. The two decisions were *Warren v. Tay Say Geok & Ors.* [1965] 1 MLJ 44 and *Linggi Plantations v. Jagatheesan* [1972] 1 MLJ 89.

In *Soper (Pauper) v. Arnold and Anor.* [1889] 14 App. Cas 429; [1889] H.L.(E) Vol. XIV 429, the conditions in a contract of sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions the deposit should be forfeited and the vendors should be at liberty to resell. The purchaser paid the deposit, and accepted the title, but when the time for completion arrived he could not provide the residue of the purchase money. The vendors thereupon gave the purchaser notice that the contract was rescinded and the deposit forfeited. Three years afterwards, the vendors having contracted to sell to another purchaser, it was decided that their title was bad, owing to a defect which had appeared upon the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake and failure of consideration. It was held affirming the decision of the Court of Appeal (37 Ch.D 96), that the title having been accepted, and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit. Delivering a separate judgment, Lord MacNaghten said in regard to the meaning of the word "deposit":

> Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes - if the purchase is carried out it goes against the purchase money - but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

In passing, it is appropriate to say that the Privy Council in *Linggi Plantations v. Jagatheesan* (supra) clearly established that there is no difference between deposit and earnest money. See the speech of Lord Hailsham LC at p. 93 right hand column at I.

An examination of the local cases will now be undertaken. In *Siah Kwee Mow v. Kulim Rubber Plantations* [1979] 2 MLJ 190, the plaintiff paid a sum of RM300,000 by way of deposit and part payment for the purchase of a rubber estate. The purchase price was RM3 million. The Court held that as the plaintiff had breached the contract, the defendants were entitled to forfeit the deposit. In *Lee Yew Hin v. Kow Lup Piow* [1974] 1 MLJ 114, it was held that the vendor was entitled to forfeit the deposit of RM22,000 which constituted more than ten per cent of the purchase price as the purchaser had not paid the balance of the purchase price on the due date. Finally, in *Song Toh Chu v. Chan Kiat Neo* [1973] 2 MLJ 206, where the owner of a piece of land who had entered into an agreement with a developer to develop the land was allowed to forfeit the deposit of RM20,000 when the developer failed to apply for sub-division of the land.

Now, all the cases cited above show a singular trend: As the purchaser has breached the contract, the vendor is entitled to forfeit the deposit.

In the present case, there is no private treaty nor a binding contract between the plaintiff and the intervener. On this score, the cases cited above are poles apart from the facts of the present case. Devoid of the private treaty or a binding contract, the intervener is entitled to a refund of his 10% deposit.

Two things must be emphasised. Firstly, the Court order of 4 September 1992, is silent as to the disposal of the 10% deposit after the expiry of the three months' period. This is quite understandable as it is tied up with the requirement that a private treaty should be entered between the parties. I would accept Cotton LJ's classic definition of the word "deposit" in *Howe v. Smith* (supra) in the context of a binding contract between both parties. But, I would not apply Cotton LJ's definition of deposit to the nebulous Court order of 4 September 1992, in the absence of a private treaty or binding contract. Secondly, the intention of the parties is not relevant nor can it be ascertained as there was no private treaty nor binding contract between them.

For the reasons adumbrated above, I affirmed the order of this Court in chambers dated 17 May 1993. The intervener is entitled to the refund of his 10% deposit and he is also entitled to costs.

Order accordingly.